SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR,

v.

ANGELA LARA, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

Supplemental and Reply Brief for the Plaintiff in Error.

ALLEGED DEFECTS IN RECORD.

The authorities cited in the brief of defendant in error in support of the contention that the plaintiff in error should not be permitted to prosecute the writ of error further because of the absence from the record in this court of a copy of the bond required in connection therewith tend to support the action of the Chief Justice at the hearing in suggesting that the interests of the plaintiff in error would not be allowed to suffer for lack of an opportunity to supply such formal defects as there may be.

O'Reilley *v.* Edrington, 96 U. S., 724.

Dodge *v.* Knowles, 114 U. S., 430.

There might also be cited the recent action of this court in several other cases.

The fact that citation was duly issued and served (R., 46) and the failure of the defendant in error to unite in the request contained in the motion of plaintiff in error for a postponement of the hearing for a sufficient time to perfect the record in respect to the bond indicate that a bond was in fact given, and that it was a mere inadvertence on the part of the clerk of the court below that a copy thereof does not appear in the record. However this may be, any defect or defects existing will be promptly remedied by the plaintiff in error.

BILL OF EXCEPTIONS.

The bill of exceptions concludes with the statement that "the foregoing testimony constitutes the substance of all of the material evidence in the case."

Preceding this conclusion there is a statement in logical order of the testimony introduced, including the following recitations, to wit:

"And thereupon the plaintiff, to maintain the issues upon her part, called as a witness in her behalf the defendant," etc. (R., 13).

"Plaintiff, further to maintain the issues on her part, was sworn as a witness in her own behalf," etc. (R., 24).

Similar introduction is given to the testimony of each of the witnesses until the end of her testimony-in-chief, which concludes with the expression, "And thereupon plaintiff rested her case" (R., 27).

"Whereupon the defendant, to maintain the issues on his part, was sworn as a witness in his own behalf and testified," etc. (R., 27).

This testimony is followed by—

"And the defendant, further to maintain the issues on his part, produced as a witness" (R., 28), etc.

The testimony of his second witness is followed by—

"And thereupon the defendant rested his case and plaintiff in rebuttal offered in evidence the letter," etc. (R., p. 29). * * *

"And further in rebuttal, the plaintiff is called as a witness in her own behalf," etc. (R., 29).

At the conclusion of her testimony in rebuttal immediately follows the expression that—

"Thereupon the plaintiff again rested, and the foregoing constitutes the substance of all of the material evidence in the case.

"Thereupon the defendant moved the court for a peremptory instruction to the jury to bring in a verdict in favor of the defendant," etc. (R., 29).

In the case of Gunnison County Commissioners *v.* Rollins (173 U. S., 255-261), this court held that the character of recitations quoted above, exclusive of the general expression, were alone sufficient to authorize the court to conclude that a bill of exception contained all of the testimony, as a basis for an inquiry upon the record whether the trial court erred in giving a peremptory instruction for the defendant.

A bill of exception concluding with the declaration that the "substance of which whole evidence is included in the bill" was held to be good and sufficient.

Rockwell *v.* Capitol Traction Co. (25 Appeals D. C., 98).

There is, therefore, nothing in the suggestion by the defendant in error that the bill of exceptions is defective.

ACTION AND DEFENSE.

The complaint is for damages based upon a breach of a promise of marriage.

In the absence of a specification thereof, the residence of

the woman (in the case at bar, Porto Rico) is the place for the performance of a promise of marriage.

Graham *v.* Martin, 64 Indiana, 567.

In the former brief for plaintiff in error it was shown that, by section 8 of the act of Congress of April 12, 1900 (31 Stats., 77, 79), the laws of Porto Rico theretofore existing with respect to the subject in hand were declared to be and continued in full force and effect. And they remained in force as laws of Congress until, like any other legislation, they were repealed in part or in whole. The alleged promise of marriage was made June 1, 1900, after the act of Congress and before any act of repeal.

The charge of the court to the jury shows (R., 33 and 34) that the suit was brought and damages for breach of the alleged promise was based, not upon the law as it existed at the date of the alleged promise, but as it existed at the time of the institution of the suit and trial of the case.

Certain authorities were cited in our former brief to the effect that the existing law must be read into and forms a part of a contract, as of the time the same is entered into, and that a party cannot be deprived of his rights or defenses thereunder because of the impairment of the obligations of the contract.

In addition to those citations, it is deemed proper to refer to the following:

McCracken *v.* Hayward, 2 How., 608-619.

Sutherland, 2d ed., sec. 673.

Globe Refining Co. *v.* Landa Cotton Oil Co. (190 U. S., 540).

In McCracken *v.* Hayward (*supra*) it is held that—

"The laws in existence at the date of the contract form part of the contract, and are the measure of the obligations of the parties."

In section 673 of Sutherland it is stated that statutes passed in respect to imperfect and inchoate rights, where they "involve expense or interfere with the existing course of business, will not be construed to affect such rights or existing cases, or impose new duties or disabilities in respect of past transactions, unless the intention to do so is clearly expressed—even remedial statutes."

In the recent case of Globe Refining Company *v.* Landa Cotton Oil Company (*supra*) this court held (syllabus) that—

"In case of a breach of contract a person can only be held responsible for such consequences as may be reasonably supposed to be in contemplation of the parties at the time of making the contract," etc.

In this case the court, speaking through Mr. Justice Holmes, said:

"When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass * * * the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured."

Under the law as it existed June 1, 1900, therefore, if a promise of marriage was made, the limit of liability for future breach on the part of the plaintiff in error was the payment by him of the amount of such expenses as she might incur by reason of the promised marriage; and the amount of this liability cannot be increased without impairing the obligations of a contract.

The defendant in error cites Sturgis *v.* Crowninshield (4 Wheaton, 122-209) as an authority for the contention that the remedy may be modified without impairing such obligation. This case is inapplicable. The change in the remedy involved the relief of a defendant from the provision of a law requiring imprisonment, which was clearly proper, as such penalty in no sense formed a substantial part of the

contract, however much it may have tended toward facilitating the practical enforcement thereof.

The paragraph cited on behalf of the defendant in error from Cooley's Constitutional Limitations tends to confirm the contentions made on behalf of the plaintiff in error.

The point suggested on behalf of the defendant in error in connection with the citation of the case of Maynard *v.* Hill (125 U. S., 190, 211) is not only contrary to the theory of the complaint itself, but is also inapplicable to the case at bar. It involved not a promise to marry, but the validity of the act of the legislature of Oregon in dissolving the bonds of marriage theretofore actually consummated. The decision of this court, speaking through Chief Justice Marshall in the Dartmouth College case, is quoted therein to the effect that the provision of the constitution "has never been understood to restrict the general right of the legislature to legislate upon the subject of divorce." In the same paragraph of the decision, however, Chief Justice Marshall (4 Wheaton, 629) said that said provision did embrace "other contracts" "which respect property *or some object of value;*" and Justice Story, in his dissenting opinion in the same case (695-697), contended that it included consummated marriage contracts as well.

In the case of Laurence *v.* Miller (2 N. Y., 251) it was held, with respect to a contract of marriage, that the law of dower which existed at the time of marriage is the law of the contract.

ARTICLE 44 ALONE APPLICABLE.

The contention of defendant in error that articles 1088, 1089, 1093, and 1902 of the Civil Code in force in Porto Rico June 1, 1900, the date of the alleged promise of marriage, are applicable to the case is untenable.

In demonstrating the proposition that article 44 of said Code was the sole provision of law under which any recovery whatsoever could be had under the law at the time, it is

deemed proper to review the history of the enactment of article 43 of the same Code, the War Department translation of which reads as follows:

"Art. 43. Future espousals do not give rise to an obligation to contract marriage. No tribunal shall admit a complaint in which their fulfillment is demanded."

While not enacted by the proper authorities of Spain until 1888, or proclaimed as a law in Porto Rico until July 31, 1889, the provision is taken verbatim from article 47 of the report of 1851 of the result of the labors of eminent Spanish jurists who prepared and compiled the ground work of the Civil Code of Spain, and, in connection therewith, stated at length the basis for the civil law doctrine involved and the intent sought thereby to be accomplished.

In volume I of the report, as printed in Spanish in 1852, pages 55 *et seq.*, after referring to the laws of the various civil law countries on the subject, the author of the report, Don Florencio Garcia Goyena, Justice of the Supreme Court of Spain and Vice-President of the General Code Commission and President of the Civil Code Sub-Commission, says:

"Los esponsales de futuro eran las mas veces tan funestos à la moral, como contrarios à la santidad del matrimonio, y à la libertad con que debe ser contráido.

"En manos de un seductor hábil eran un arma para combatir la virtud de una jóven apasionada ó do inferiores circunstancias: en las de una muger artera é hipócrita de pudor eran un lazo para enredar à un hombre locamente enamorado: mas de una vez, los padres y tutores los empleaban para asegurar sus combinaciones de interés, de ambicion ó vanidad, comprometiendo anticipadamente à sus hijos ó menores.

"Eran tambien opuestos à la plena libertad de los matrimonios.

* * * * * * *

"Nuestro articulo 47 corta estos gravísimos inconvenientes, como tambien la delicada *cuestion del hecho y del derecho* en cuanto à la competencia del conocimiento. * * *

"El articulo, propuesto por mi à la Seccion del Código civil y por elia à la Comision general fué aprobado por esta como base, en sesion de 9de enero do 1844."

Translation.

"Promises of marriage are most times injurious to the preservation of good morals, to the sanctity of marriage, and to the liberty with which marriages should be contracted.

"In the hands of an able seducer, they may be used as a weapon against the virtue of a young woman in love, or of a woman in poor circumstances. In the hands of a skillful and dexterous, hypocritical woman they may be turned into an instrument to entice a man insanely in love. More than once, parents and guardians have made use of them to secure combinations, in which interests, ambition or vanity prevailed, by binding both parties beforehand.

"They are clearly at variance with the full liberty of marriage.

* * * * * * *

"Our Art. 47 puts an end to all these most grave evils, as well *as to all questions of fact and law on the subject.* * * *

"The article as prepared by me, and submitted to the Committee of Civil Code, and by it to the Commission in full, was approved by the latter January 9, 1844."

It thus appears that article 43 was intended by its framers to prevent any actions whatsoever from being founded upon a breach of promise of marriage, the theory of the fundamental civil law from which it was an outgrowth being that neither remedies of specific performance nor damages should be allowed to superinduce or tend to bring about the unhappy results so strongly presented in the report. And the enactment of this provision was subsequent to and constituted an epoch not covered by the doctrines laid down in Escriche.

With such a provision in the Code, involving as it did the principle governing Spain on the subject, nothing but the clearest statutory expression could be construed to embrace actions clearly contrary to the theory enunciated under the appropriate title in the Code.

There is no such provision in the Code of 1889 except article 44.

This article was not contained in the Commission's report of 1851, but seems to have been taken verbatim from article 54 of the Italian Civil Code, and to have been incorporated provisionally into the Spanish Civil Code project in 1882 for the first time. (See Scaevola Codigo Civil, Vol. II, pp. 75-76, published in 1899.)

The same commentator states that its enforcement has been unsuccessful, owing to an aversion on the part of those concerned to making public such matters and the difficulty in establishing "just cause."

It is believed that before the changes were made in the Civil Code, as it existed at the date of the alleged promise of marriage, no court could have construed articles 1088, 1089, 1093, and 1902, or any of them, as being applicable to or as supporting the action involved in the case at bar.

The trial court did not make any such claim, and the conclusions reached were based upon no such theory; on the contrary, immediately after the conclusion of the argument of counsel on the subject, in his charge to the jury, the court below said:

"It may be necessary to explain to the jurors who are natives of Porto Rico, the great change that took place in the law governing this class of cases when the sovereignty of Spain over Porto Rico was ceded to and assumed by the United States. Under the former regime, the Church and State were united. Contracts of marriage and also of engagements of marriage were regulated by the Church. There were known to be two kinds of marriages, one being a canonical marriage and the other a civil marriage. The Church had its way under Spanish Government by regulating the marriages. *One of the familiar customs enforced by the Catholic Church was that the banns of marriage were required to be published three successive Sundays in churches of the marrying couple.* If any person had an objection or claim against the proposed marriage there could be filed with the priest of the parish a remonstrance, and he would be obliged

to refuse to perform the marriage ceremony. That existed when the Church and State were united and where the people, as in Porto Rico, were then all of one denomination. Under these conditions a young man or woman would hesitate about breaking marriage engagements, because of creating an impediment to being married in the Church. All that ecclesiastical practice and rules, however, have now changed in Porto Rico. In Porto Rico, where the Church and State have now fortunately no connection and the laws passed by Congress of the United States and the Legislature of Porto Rico, and which latter wherever practical are to be followed and administered by the United States Court, govern and control the question of *marriage contracts, as in cases of any civil contract.*

"Therefore you are to judge and determine this case under the laws *now existing.* The law of Porto Rico, like the laws of the United States, regards a contract of marriage as a purely civil contract. It is to be judged by you as an ordinary contract, and if it has been violated, and whether a valid cause or excuse for its violation is proven." (Italics supplied.)

The contention that articles 1088, 1089, 1093, and 1902, or any of them, were applicable to the alleged promise of marriage at the date thereof is untenable; and the suggestion of the proposition but demonstrates the weakness and desperate character of the defense.

It follows, therefore, that article 44 is the only provision of law existing at the time of the alleged promise of marriage on which an action for breach of promise could have been based.

It is admitted, in argument, that the record proof does not show that the alleged promise was made "in a public or private instrument" or that "the banns" were "published." Both the record and the charge of the court show that it was not a promise of marriage within the meaning of article 44; and the court stated to the jury that there was no evidence to show that the defendant in error incurred any expenses by reason of the promised marriage.

The conclusion is irresistible, therefore, that the court

erred in peremptorily charging the jury that a promise of marriage had been proven and that the defendant in error was entitled to damages for a breach of promise.

CONCLUSION.

In conclusion, it is deemed proper to say that the legislation enacted for Porto Rico since 1900 involves a most radical change in conditions there in respect to the subject involved.

To sustain the action of the court below would accentuate the difficulties by giving a retroactive effect to the new statutes, so as to bring within its purview all engagements to marry made at any time prior to their enactment, whether the formalities of the then existing law (article 44) were complied with or not.

An act of Congress (if not a treaty of the United States) has been brought in question, and there is thus presented in good faith in the case at bar a Federal question, of which this court has jurisdiction under section 35 of the act of Congress approved April 12, 1900 (31 Stats., 77-79).

It is respectfully asked that the judgment of the court below be reversed for the errors assigned.

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